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NO. 405

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1967

LEROY POWELL,

*Appellant*

vs.

THE STATE OF TEXAS,

*Appellee*

On Appeal From the County Court at Law No. 1 of Travis County, Texas

## BRIEF FOR APPELLEE

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## BRIEF FOR APPELLEE

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## QUESTION PRESENTED

The appellee believes that the question presented may be more precisely stated than is set out in the brief of appellant. Under the testimony adduced at the trial, the question is:

Whether imposition of a $50 fine (or 10 days in jail)[1] for public intoxication by one who habitually drinks alcoholic beverages to excess in spite of capacity to

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[1]The sentence formally pronounced was a $50 fine. In the event a misdemeanant is unable to pay a fine the Texas Code of Criminal Procedure, Article 43.09, provides for compulsory work or confinement in jail for a period of one day for each five dollars. Thus the maximum sentence which can be imposed for public drunkenness under Article 477 of the Texas Penal Code is $100 fine or 20 days confinement.

totally abstain from such drinking constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

## STATEMENT OF THE CASE

Appellant, age 66, was convicted of "being found in a state of intoxication in a public place" in violation of Article 477 of the Texas Penal Code.[1] The state called a single witness, the arresting officer, who testified to observing the appellant at a public place on Hamilton Street in Austin, Texas. The policeman stated that appellant staggered when he walked, that he smelled strongly of alcohol, and that his speech was slurred.[2] The officer stated that it was his opinion that appellant was "very intoxicated."[3]

The defense called three witnesses. One, a police lieutenant in charge of the Austin Identification Section, identified arrest records, which indicated appellant had been arrested 72 times for public drunkenness and once for disturbing the peace. The first arrest was in 1949 and the last was the offense charged.[4]

The defense also presented the testimony of appellant, who stated that he estimated he had been arrested "about a hundred times" during his many years of drinking.[5] Appellant's testimony as to whether he felt he had will power to control his drinking was conflicting, depending on whether he was being led on direct or cross-examination.[6] The appellant did testify that

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[1] A. 58.
[2] A. 8-9.
[3] A. 8.
[4] A. 28-33, 50.
[5] A. 36.
[6] Compare, e.g., A. 37, 44 with A. 42.

he had but one drink on the morning of the trial, since he knew he had to appear in court that afternoon.[9]

Dr. David Wade, a psychiatrist especially interested in alcohol problems was the other defense witness. He testified that appellant was a "chronic alcoholic." Dr. Wade stated that appellant had the power to abstain from drinking when he was sober, although he was strongly disposed to begin drinking.[10] After his first drink, he would be unable to stop short of intoxication.[11] Dr. Wade indicated that he felt that appellant did not realize that he could not drink one or two drinks only.[12] In this respect he was contradicted by the testimony of appellant when questioned by defense counsel.[13]

The trial court entered "findings of fact" which accepted all of the premises asserted[14] by defense counsel:

1. That chronic alcoholism is a disease which destroys the afflicted person's will power to resist the constant, excessive consumption of alcohol.
2. That a chronic alcoholic does not appear in public by his own volition but under a compulsion symptomatic of the disease of chronic alcoholism.
3. That Leroy Powell, defendant herein, is a chronic alcoholic who is afflicted with the disease of chronic alcoholism.[15]

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[9] A. 42.
[9] A. 24.
[10] A. 26.
[11] A. 27.
[12] A. 26.
[13] A. 44.
[14] A. 51. The findings are in language which appears to be taken from the defense argument in *Driver v. Hinnant*, 356 F.2d 761, 763, (C.A. 4, 1966).
[15] A. 53.

The court in its conclusion of law held these findings not to be a defense to the offense charged."[10] The present appeal followed.

## SUMMARY OF ARGUMENT

This Court is not limited by the findings of fact and extent of the record in this case, dealing, as it does, with national constitutional standards applicable to public intoxication. There is reason to believe that most persons who are convicted of this offense have capacity to totally abstain, although perhaps an inability to drink moderately. The evidence in the present case establishes appellant to be of this group.

Under established principles of criminal law appellant had an awareness of wrongdoing (mens rea) and chooses to drink and to appear in public (actus reus).

Appellant does differ from most persons enmeshed in the criminal law in a quantitative sense: the pattern of his recidivism is more extensive.

The analysis of the issues of this case cannot be facilitated by speculation concerning ancient perplexities surrounding the concept of freedom of the will. Appellant experienced freedom in the sense that we all experience freedom, and he chose, as we all choose. If one takes the presently dominant psychiatric view of man, his choices are determined by prior factors, as all of ours are. Under similar assumptions, if deemed exculpatory, no person engaging in criminal behavior is responsible.

It is also of no assistance to the understanding of this case to ask whether appellant was suffering from a "disease of alcoholism." Psychiatrists' classifications

[10]A. 53.

for medical purposes are not dispositive of problems of legal decision. In addition, since psychiatric diseases are defined as behavior disorders it confuses an abstraction from conduct with its cause to say that chronic alcoholism *caused* appellant to become chronically alcoholic. Furthermore, it is now generally recognized that the fields of psychiatry and criminal law are not mutually exclusive. They overlap. They both concern control of deviant behavior.

Conventionally acceptable purposes of the criminal law are served by prosecution of inebriates whether chronic or occasional. They are removed from the streets and placed in an environment where they become detoxified. They are given food, clothing, and shelter and a period of compulsory continence, and restriction of their liberty is for a limited period of time. From a legal standpoint, this case raises the question of whether *Robinson v. California,* 370 U.S. 660 (1962), ought to be extended beyond its express limitations to prohibit convictions for crimes involving anti-social behavior. We urge that it should not. Such has been the rulings of the cases considering the question in the context of crimes of conduct associated with narcotics addiction. On the other hand, the decision of *Driver v. Hinnant,* 356 F.2d 761 (4 Cir., 1966), while distinguishable, appears to point the other way.

Adoption of the view that habitual violation of public intoxication laws provides a defense would have revolutionary and damaging consequences to the law. Criminal behaviour of inebriates might be excused irrespective of conventional conceptions of legal insanity. Crimes of alcoholics and drug addicts may be excused upon a finding that they are a "product of ad-

diction." All crimes might also be excused if committed by a person whose pattern of deviant behaviour has been medically labeled. And the principle urged by appellant here, if accepted with full force, would exculpate all crimes if one accepted a deterministic view of man.

Finally, it is rationally doubtful if reversal of the judgment of the present case would serve habitual public alcoholics. The alternatives to criminal conviction are leaving them, if they wish, on the streets or to civily commit them to public institutions.

Treatment facilities and personnel at present and in the foreseeable future are so lacking as to be largely non-existent. And the prognosis for skid row alcoholics, who are most commonly the subject of prosecution under these laws, is extremely poor. Thus, indefinite confinement for treatment is not a rationally-compelled alternative to present practice.

## ARGUMENT

1. *The Supreme Court is not limited by the "findings of fact" in this case, or by the extent of the record in the trial court.*

The first two "findings of fact," unless they are mere definitions of their terms and hence not facts at all, are conclusions of "legislative facts," to use Professor Kenneth Davis' illuminating phrase, that is to say, facts bearing on the rule of law which ought to be recognized, rather than the facts primarily relating to the particular parties to this case.[17] As such the Court may

[17]See 1 Davis, *Administrative Law Treatise* §7.02; *McCormick on Evidence*, 705-707.

act upon judicial notice and is not confined to the record in the lower court.

Obviously the rule of law applicable to millions of arrests in the United States for public drunkenness cannot properly turn on the witnesses called in a single trial or the conclusions of a single judge.[18]

Furthermore, the Court is not bound by state court general conclusions, as opposed to findings with respect to specific events. In *Watts v. Indiana,*[19] the Court stated:

> "But 'issue of fact' is a coat of many colors. It does not cover a conclusion drawn from uncontroverted happenings, when that conclusion incorporates standards of conduct or criteria for judgment which in themselves are decisive of constitutional rights. Such standards are criteria, measured against the requirements drawn from constitutional provisions, and their proper applications, are issues for this Court's adjudication. Hooven & Allison Co. v. Evatt, 324 U.S. 652, 659, 65 S.Ct. 870, 874, 89 L.Ed. 1252, and cases cited. Especially in cases arising under the Due Process Clause is it important to distinguish between issues of fact that are here foreclosed and issues which, though cast in the form of determinations of fact, are the very issues to review which this Court sits. [citations omitted]'"[20]

The findings in this case are not even supported by the record, the critical portion of which is the testimony of the sole expert witness, Dr. David Wade. Dr. Wade testified as follows:

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[18]We would be disinclined to belabor the point were it not for the assertion of Amici A.C.L.U. et al. that this Court is so bound (Br. 17).

[19]338 U.S. 49 (1949).

[20]*Id.* at 51.

Q But at the time that he takes the first drink from a sober condition, would you say that is a voluntary exercise of his will?

A Yes—I would like to answer that question "Yes." But I would like to say that we must take into account the fact that these individuals have a compulsion, and this compulsion, while not completely overpowering, is a very strong influence, an exceedingly strong influence, and this compulsion coupled with the firm belief in their mind that they are going to be able to handle it from now on causes their judgment to be somewhat clouded. Again, let me reiterate that the first answer is, "Yes."

Q Could you distinguish between this type of initial compulsion from that of a compulsive eater or any other type of compulsion?

A It is the same type of compulsion. There is no basic difference between the types of compulsion."[11]

Dr. E. M. Jellinek, a leading medical writer in the field[12] goes even further:

> "The loss of control extends over a given drinking bout, after which the gamma alcoholic [a term which he applies to the dominant U.S. type of alcoholic][13] is able to 'go on the wagon,' i.e., to abstain for shorter or longer periods. His starting a new bout is not ascribable to the mechanism of loss of control nor to compulsion, but rather to an impulse whose danger either is not recognized or is 'explained away'."[14]

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[11] A. 22-23.

[12] Dr. Jellinek's work is cited by both Appellant (Br. 9, 11) and Amici A.C.L.U. et al. (Br. 3a).

[13] Jellinek, *The Disease Concept of Alcoholism* (1960), 38.

[14] *Id.* at 42. See, also Keller and Seeley, *The Alcohol Language* (1958) 21.

Thus it is unnecessary to adopt an "original sin" theory of voluntary conduct by the alcoholic, i.e., referring to decisions in earlier life, to characterize continuing use of the bottle as voluntary.

The success of Alcoholics Anonymous fully supports the position of Doctors Wade and Jellinek that persons similar to appellant can become chronic abstainers, although perhaps not moderate drinkers.[8]

2. *"Disease" is a term which is almost wholly vague; "mental disease"[9] is obsolescent as well as vague even within medical usage. It does not refer to an entity to be hypostatized or used in different contexts as if it had unitary meaning.*

Dorland's Illustrated Medical Dictionary (24th ed. 1965) states:

> "disease (Fr. des from—aise ease). A definite morbid process having a characteristic train of symptoms; it may affect the whole body or any of its parts, and its etiology, pathology and prognosis may be known or unknown."

Dr. Jellinek, after noting that the word "disease" is essentially undefined by medical professionals, asserts:

> It comes to this, that *a disease is what the medical profession recognizes as such.*"[10]

While such reference to "morbid process" and usage

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[8]See Jellinek, supra, at 41.

[9]According to the *Manual on Alcoholism* (1962) prepared by the American Medical Association, Committee on Alcoholism, Counsel of Mental Health, "Since as yet no physical etiological factor has been proven to be the cause of this illness, it must necessarily be classified as a phase of emotional illness." *Id*, at 5.

[10]Jellinek, *The Disease Concept of Alcoholism* (1960) 12 (emphasis original).

may be of some utility, albeit limited, with respect to physical illness, perceptive modern medical authorities attempt to avoid imprecise analogies suggested by the phrase "mental illness."

In their widely recognized recent text *The Theory and Practice of Psychiatry* (1966) Doctors Federick C. Redlich and Daniel X. Freedman, the Dean of the Yale Medical School and Chairman of the Psychiatry Department, University of Chicago, respectively, point out:

> "In older texts and in current lay parlance, psychiatry is often defined as the science dealing with mental diseases and illnesses of the mind or psyche. Since these are terms reminiscent of the metaphysical concepts of soul and spirit, we prefer to speak of behavior disorder . . . Whereas many cerebral diseases produce a behavior disorder, and while we believe that cerebral processes must be related fundamentally to behavior, *medically* recognizable diseases of the brain cannot, for the most part, be demonstrated in behavior disorders. 'The primary subject matter of psychiatry then is the disturbed or deviant behavior of the individual . . .' *Id.* at 2 (emphasis original). 'What, then, are these difficulties psychiatrists are supposed to treat, the so-called behavior disorders? Defying easy definition, the terms refer to the presence of certain behavioral patterns—variously described as abnormal, subnormal, undesirable, inadequate, inappropriate, maladaptive, or maladjusted—*that are not compatible with the norms and expectations of the patient's social and cultural system'.*" Id. at 1. (emphasis supplied)

Whether the term be "mental disease" or "illness" or "behavior disorder" it should be recognized that its use, in the last analysis, greatly overlaps the area of

behavior proscribed by criminal laws. Indeed, some psychiatrists regard *all* delinquent behavior as ill." The danger in assuming that the word "disease" has any definite meaning was vividly illustrated in *Blocker v. United States*[28] in which the Court sought to apply its *Durham* rule. At his first trial Blocker was described by medical witnesses as having a sociopathic personality disturbance, but it was stated that this was not considered a mental disease. Shortly after this trial the administrative staff of St. Elizabeth's Hospital decided to classify sociopathy as a "mental disease." The Court of Appeals ordered reversal of the conviction "on the basis of this new medical evidence," failing to recognize that the change was in the way a hospital would use a phrase.

However, the same Court later stated:

> "Our purpose now is to make it very clear that neither the court nor the jury is bound by *ad hoc* definitions or conclusions as to what experts state is a disease or defect. What psychiatrists may consider a 'mental disease or defect' for clinical purposes, where their concern is treatment, may or may not be the same as mental disease or defect for the jury's purpose in determining criminal responsibility."[29]

The Court might have gone further. There is no need to define the concept of disease for medical purposes and the *Diagnostic and Statistical Manual—Mental*

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[28]See, e.g., P. Q. Roche, *Criminality and Mental Illness: Two Faces of the Same Coin*, 22 U.Chi.L.Rev. 320, (1955), Karpman, *Criminality, Insanity, and the Law*, 39 J.Crim.L., C.&P.S. (1949) 584.

[29]274 F.2d 572 (C.A.D.C. 1959).

[30]*McDonald v. United States*, 312 F.2d 847, 851 (C.A.D.C. 1962).

*Disorders* (1952) of the American Psychiatric Association does not make the attempt.

Appellant involves himself in further error when he alleges his principal contention: The "disease of chronic alcoholism" has destroyed his will power and caused his public intoxication in the case at bar." If one classifies a behavior disorder and uses the phrase "disease of chronic alcoholism" to name it, one only adds confusion to call the disease a *cause* of deviant behavior. Stripped of obscurity such an assertion is translatable into a contention that the cause of appellant's deviant behavior was his deviant behavior. Underlying all of this, it is submitted, is the notion that "alcoholism" *really is* or is not a disease. Such an approach to the problem ignores the fundamental point that a "disease" is anything which we may wish to call a disease and that the application of such a label does not increase our understanding of the phenomenon. Appellant thus commits the fallacy of reification, the hypostasis of abstractions into substances."

If "alcoholism" were held to be a defense to a criminal conviction it would be necessary to define it for purposes of the Eighth and Fourteenth Amendments. Jellinek attempts a classification of what he denominates as "alpha," "beta," "delta," "gamma," and "epsilon" alcoholism. He also summarized 52 formulations of "alcoholism" by others." Appellant in his brief lists five definitions, the first of which is substantially dissimilar to those which follow in that it

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"App. Br. 6; See Amici A.L.C.U. et al. Br. 22-24.

"See Farnside and Holther, *Fallacy, the Counterfeit of Argument* (1959), 41-45; Szasz, *Law, Liberty and Psychiatry* (1963), 132-135.

"Jellinek, *The Disease Concept of Alcoholism* (1960) 35-58.

does not mention "loss of self-control." The phrase "loss of self-control" is itself not a model of clarity. One effort defines "loss of control over drinking" as "the inability, whether on some or all occasions, to stop voluntarily when some alcoholic beverage is ingested."[10] But the problem of differentiating between the uncontrolled drinker and other excessive drinkers remains. To state that "loss of control" constitutes "inability to stop" once drinking has begun, does not markedly advance the endeavor, except that it excludes inability to abstain. It would also be necessary to permit it to be defined so as to be operationally, clearly distinct from other excessive drinking.[11] How is the decision to be made between those who do not stop but can, and those who do not stop and cannot?[12]

3. *Anglo-American criminal law does not require taking a stand on the age-old philosophical question of whether man has freedom of the will. The United States Constitution should not be interpreted as taking a position on it.*

Amici A.C.L.U. et al. argue that our legal traditions require exculpation whenever a conclusion is made that the behavior was not engaged in as a result of "free will."[13] Similar statements have sometimes appeared in judicial decisions.[14] Amici A.C.L.U. et al. sometimes

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[10] Keller and Seeley, *The Alcohol Language* (1958) 21.

[11] See Robitscher, *Psychiatry and Changing Concepts of Criminal Responsibility* 31 Fed.Prob. No. 3, 45, 50 (1967); Glaser and O'Leary, *The Alcoholic Offender* (1966) 5.

[12] Dr. Robitscher as well as others seem to doubt that this can be done. See *op. cit.* supra, note 22 at page 50.

[13] Br., 14-22.

[14] See *Durham v. United States*, 214 F.2d 862, 876 (D.C. Cir. 1954); *State v. Lucas*, 30 N.J. 37, 152 A.2d 50, 75 (1959), [concerning opinion of Weintraub C.J.]

makes this argument as though it were a direct assumption of the Eighth and Fourteenth Amendments, and sometimes via an assertion that a criminal act *(actus reus),* required as a common law prerequisite of responsibility, assumes free will. On the other hand, one of the greatest contemporary writers on criminal law concludes:

> "The definition of an act in this regard is governed largely by policy. A drunkard who, in his partly insensate condition, does some injury is deemed to perform an act, though in fact his condition may be very much like that of the sleepwalker. Drunkenness is a self-induced condition; sleep-walking is not. On the other hand, an injury done in a drunken sleep receives the same exemption as any other injury during sleep. It seems that a lunatic is deemed to perform an act even where he is acting as an automaton, though he will be exempted from criminal responsibility (§ 156).
>
> Where there is consciousness, a party is capable of 'acting' even though he is subject to an uncontrollable impulse . . . An act presupposes will, but not 'free' will."[38a]

The traditional tests for legal insanity do not purport to exculpate all those lacking capacity to do otherwise. The M'Naghten Rules look to cognition not volition.[39] At the time of the survey by the American Law Institute in 1955, 30 American states followed

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[38a]Glanville Williams, *Criminal Law* (1961) 12-13.

[39]*M'Naghten's Case,* 10 Cl. & F. 200, 8 Eng. Rep. 718 (1843). "[I]t must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong."

M'Naghten.[40] Even the "irresistible impulse" addition to the foregoing test (14 states) does not attempt to exculpate for non-impulsive lack of volition. Similarly, the test proposed by the American Law Institute does not propose to exclude from responsibility all those deemed to lack capacity to do otherwise.[41]

Mr. Justice Holmes was comfortable with the traditions of our criminal law and with a personally strong deterministic position.[42]

There is additional strong reason for the law to avoid a commitment on the determinism-free will controversy. To constitutionally commit American criminal law to an opposing view would create fundamental conflict between legal and psychiatric views of man. Modern psychiatry has tended to view man as controlled by antecedent heriditary and environmental factors. Freud, for example, wrote:

> "I have already taken the liberty of pointing out to you that there is within you a deeply rooted belief in psychic freedom and choice, that this belief is quite unscientific, and that it must give ground before the claims of a determinism which governs even mental life.'"[43]

Redlich and Freedman write:

> "As a technology based on the behavioral and biological sciences, psychiatry takes a deterministic point of view. This does not mean that all phenomena in our field can be explained, or that there is no uncertainty. It merely commits us to a scien-

[40]Tentative Draft 4, p. 160.
[41]Proposed Official Draft, Section 4.01.
[42]Holmes, Holmes-Laski Letters 806, quoted in Paulsen and Kadish, *Criminal Law and Its Processes* (1962), 75.
[43]*Introductory Lectures on Psychoanalysis* (1923) 87-88.

tific search for reliable and significant relationships. We assume causation—by which we mean that a *range* of similar antecedents in *both* the organism and environment produces a similar *set* of consequences.'"[4]

The traditionally acceptable purposes of the criminal law, treatment, isolation, and deterrence are fully consistent with a deterministic view. But we do not urge its acceptance or rejection. The question of ultimate freedom or ultimate determinism is simply irrelevant, in view of the facts here.

As for the present case, it should suffice that there was a subjective consciousness of freedom to choose each time appellant began to drink, knowing that his past experience had been that he would continue to ingest alcohol to the point of public drunkenness." For the purposes of the criminal law it should not matter whether from an Olymphian point of view, appellant's decision may be attributed to unconscious impulses originating in experience in his early life, or in sociocultural factors. Otherwise there would be no criminal law and society would have no protection from behavioral deviants.

But what rational purpose does criminal prosecution of chronic inebriates serve? The acutely intoxicated are removed from the streets, placed in an environment where they sober up, and are given food, clothing, shelter and a period of compulsory continence. And the period of their loss of liberty is a limited one. Of course many are not "cured" by this ap-

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[4]*The Theory and Practice of Psychiatry* (1966), 79 (emphasis original).

[5]See Katz (ed.) et al., *Psychoanalysis, Psychiatry, and Law* (1967) 368-372.

proach. Among these are the Powells, the Drivers, the Easters.

We would underestimate the ability and energy of our opponents if we assumed that these persons were typical of the population of inebriates who have violated laws proscribing public drunkenness. Undoubtedly large numbers of such cases are not the subject of arrests at all."

Many others are freed without further effort at prosecution after a few hours of detoxification." Others are released on paying fines. Of those that remain and are sentenced to jail the great majority have records which are much less depressing than those of appellant, Mr. Driver, and Mr. Easter. In a study of a penal facility in Monroe County, New York, of a large number of "chronic police case inebriates," randomly selected, except that each which was chosen was already a recidivist and each had received a sentence for 30 days or more, the mean lifetime record of arrests was 16.5, and the median 10.2." Appellant also does not reflect the high degree of association between drunkenness and major crimes including homicide, rape, robbery, aggravated assault." A two year study by Columbus, Ohio, police of all persons arrested for felonies found that 64 per cent of these individuals were under the influence of alcohol to a degree causing reduction

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"See Report by the *President's Commisison on Crime in a Free Society* (1967) 233.

"See *Id*, at 234.

"See Pittman and Gordon, *Revolving Door* (1958) 43.

"See *Id.* at 46. Dr. Karen Horney is somewhere quoted as having observed: "The superego [conscience] is that part of the personality which is soluble in alcohol."

of inhibitions."[50] In an earlier study of 3000 admissions to Sing Sing Prison, it was found that 22 percent of the prisoners were habitually intemperate and 15 percent were intoxicated at the time of their crime."[51]

Those who violate the criminal laws always are the failures of the system. They were not deterred, and the recidivists were not reformed. One would not suggest that antibiotics should be abandoned in the treatment of syphilis or tuberculosis upon a study solely of those who were not cured, however. Yet Amici, who apparently believed excessive drinking is very much like syphilis or tuberculosis, indicate that they assume that such studies, without controls, have scientific validity."[52]

The moral condemnation implicit in criminal conviction may be useful to the overwhelming majority of the citizenry who are not public inebriates."[53] It may encourage potential alcoholics to change their drinking behavior. There is much that is not known about this enormously complex problem. That is one reason

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[50]Sharpe, *Alcohol and Crime, A Study of Urine-Alcohol Concentrations Found in 882 Persons Arrested During or Immediately After the Commission of a Felony,* 44 J.Cr. L.C. & P.S. 661-664 (1954).

[51]Banay, *Alcoholism and Crime,* 2 Quart. J. Studies on Alc. 686-716. (These investigations, together with others are summarized in Glaser and O'Leary, *The Alcoholic Offender* (U.S. Dept. of H.E.W., 1966) 11-12.

[52]See Brief A.C.L.U. et al., footnote 58 and accompanying text.

[53]It is interesting to note that the incidence of problem drinking is dramatically low in some American subcultural groups. This has been associated with inculcation of an attitude that excessive drinking is wrong, not merely "ill." See Cooperative Commission on Study of Alcoholism, *A Report to the Nation* (1967) 48; Pittman and Snyder (ed), *Society, Culture, and Drinking Patterns* (1962) 217.

not to jettison the present system of social control under the fiat of constitutional adjudication.

If the appellant's contentions succeed one may expect that an extensive history of prior convictions for intoxication will lead to exculpation, for this will in fact result in a diagnosis of "chronic alcoholism." The normally law-observant citizen who behaves similarly will be subject to criminal conviction, for his more sober history will lead to a contrary diagnosis. Such results would be unlikely to breed respect for our law.

As for mens rea, it has never been held that the legislature may not dispense with such a requirement in public welfare offenses.[8] In any event, the record in this case contains the testimony of appellant's expert that appellant knows the difference between right and wrong, at least when sober, voluntarily drinks, knows he frequently does so to the point of public intoxication.[9] Appellant possessed mens rea.

4. *Appellant's attempt to apply the rule of Durham v. United States*[10] *across the nation via the Eighth and Fourteenth Amendment should be rejected.*

*Durham* held that a defendant is not criminally responsible if his conduct is the product of mental disease or defect. In view of the similar contention made here it is significant that neither the appellant nor Amici cite it. The much more restrictive M'Naghten Rules have survived previous Fourteenth Amendment attack. *Leland v. Oregon*, 343 U.S. 790 (1952).

The problems of *Durham* have been manifold, and

[8] See, e.g., *United States v. Balint*, 258 U.S. 250 (1922); *United States v. Dotterweich*, 320 U.S. 277 (1943).
[9] Tr. 22-23.
[10] 214 F.2d 862 (1954).

it has met virtually unanimous rejection by other jurisdictions. "Disease" remains almost wholly vague, subject to both restrictive interpretation and, alternatively, to construction so broad as to preclude all criminality. *Durham* did not define the term "disease" other than to state: "We use 'disease' in the sense of a condition which is capable of either improving or deteriorating.'"[9] In *McDonald v. United States*[10] the Court did attempt a definition: "'[T]he jury should be told that a mental disease or defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls.'"[11] It is respectfully submitted that the Court has *not* resolved the vagueness of the test. It continues to confuse an abstraction from behavior with its cause, to rest upon metaphysical assumptions of psyche or mind, and to fail to provide a standard capable of operational use to distinguish between criminal abnormal behavior and non-criminal abnormal behavior. Furthermore, "product" in *Durham,* while initially vague, has been so sweepingly defined as to make its absence difficult, if not impossible to establish.[12]

In proposing *Durham's* rejection, the American Law Institute Model Penal Code insanity rule states:

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[9]Id. at 875.

[10]312 F.2d 847 (C.A.D.C. 1962).

[11]Id. at 851.

[12]*Carter v. United States*, 252 F.2d 608 (1957) holding that if it cannot be proven that the criminal act would not have occurred but for the disease, it is its product. This causation conclusion is inconsistent with the assertions of Amici Brief 56-57, and if "chronic alcoholism" is a "disease" for purposes of such a test, and a *Carter* causal relationship sufficies, a very substantial percentage of persons who commit serious crimes ought to be exculpated. See footnote , supra.

> "As used in this article, the terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.'"[11]

The comments to this section state:

> "While it may not be feasible to formulate a definition of 'disease,' there is much to be said for excluding a condition that is manifested only by the behavior phenomena that must, by hypothesis, be the result of disease for irresponsibility to be established . . . It does not seem useful to contemplate the litigation of what is essentially a matter of terminology; nor is it right to have the legal result rest upon the resolution of a dispute of this kind.'"[12]

If the pattern set by *Durham* and *Carter* were followed by Eighth Amendment cases, it may be expected that homicide by an alcoholic robber seeking drink might be exculpated since the breaking and entering to obtain alcohol can be said to be a "product" of his "disease." The narcotics peddler who attempts to obtain money for drugs for his own addiction might be treated similarly.[13] Murder by a chronic inebriate whose inhibitions have been relaxed by liquor may be excused even though unrelated to the seeking of alcohol. Less obviously, one charged with tax evasion might find acquittal upon acceptance of defense psychiatric testimony that he suffered from a diseased condition

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[11] P.O.D. Section 4.01.

[12] T.D. 4, p. 160.

[13] More than 40% of narcotics defendants handled by the Federal Bureau of Narcotics, almost all of whom are narcotics peddlers, are addicts. *Report by the President's Commission on Law Enforcement and Administration of Justice* (1967) 219. More than 10% of New York City persons arrested for felonies against property are narcotics addicts. *Id.* at 222.

characterized by a compulsion to accumulate money.

5. *The principle of Robinson v. California ought not to be extended beyond its express limitations to nullify criminal prohibitions directed at delinquent behavior.*

In *Robinson,* the Court held that it was "cruel and unusual punishment"[10] to imprison for addiction to the use of narcotics.

The Court stated:

> "The broad power of a State to regulate the narcotic drugs traffic within its borders is not here in issue. More than forty years ago in *Whipple v. Martinson,* 256 U.S. 41, this Court explicitly recognized the validity of that power: 'There can be no question of the authority of the State in the exercise of its police power to regulate the administration sale, prescription and use of dangerous and habit-forming drugs . . . The right to exercise this power is so manifest in the interest of the public health and welfare, that it is unnecessary to enter upon a discussion of it beyond saying that it is too firmly established to be successfully called in question.' " 256 U.S., at 45."

Stating that narcotics addiction is an illness, the Court concluded:

> "We hold that a state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State

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[9] The California statute was "unusual" in penalizing mere addiction. See *Robinson v. California,* 370 U.S. at 672-673 (concurring opinion of Douglas, J.). On the other hand, public drunkenness appears to be the most commonly committed offense in the United States. See *Uniform Crime Reports* (1966) 113.

[10] 370 U.S. at 664.

or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment.'"[9]

The concurring opinion of Mr. Justice Douglas stated:

"The impact that an addict has on the community causes alarm and often leads to punitive measures. Those measures are justified when they relate to acts of transgression. But I do not see how under our system *being an addict* can be punished as a crime.'"[10]

The other concurring opinion, written by Mr. Justice Harlan, based its agreement on the California interpretation of its statute, which "was to authorize criminal punishment for a bare desire to commit a criminal act.'"[11] In contrast to *Robinson* the present case involves anti-social conduct, as the State of Texas has defined its norms for public behavior. To commit the offense charged defendant either became intoxicated in a public place or drank in a private place and moved to a public one. The crime is comparable to illegal possession of narcotics or firearms.

However in *Driver v. Hinnant*[12] a panel of the Court of Appeals for the Fourth Circuit granted habeas corpus to an inebriate who had been sentenced to two years confinement as a more than three-time violator within a twelve month period. With the exception of the greatly increased possible penalty, the North Carolina statute involved in *Driver* is similar to the one in the present case.

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[9]370 U.S. at 667.
[10]370 U.S. at 674. (emphasis original)
[11]370 U.S. at 679.
[12]356 F.2d 761 (C.A. 4, 1966).

The Court of Appeals based its ruling on four points: First, it found that chronic alcoholism is almost universally accepted medically as a disease; therefore its behavioral manifestations could not be a crime. The State of Texas takes the position that classification for *medical* purposes is a terminological endeavor which does not rationally advance analysis for *legal* purposes.[70]

Secondly, the Court in *Driver* stated that its decision only reached "involuntary" drinkers:

> "... [I]t is the addict"—the involuntary drinker—on which our decision is now made. Hence we exclude the merely excessive—*steady or spree*—voluntary drinker.'"[71] (Emphasis supplied.)

The testimony in the present case, in contrast to the findings, established that Powell had the capacity to abstain from all drinking, as we have attempted to point out. Leading authorities in the field also take a similar view with respect to the predominant group of persons in the United States referred to as "alcoholics."[72] Of course if one takes a deterministic position he might say that if Powell did not have the restraint to abstain, he did not have the *power* of re-

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[70]See supra, p. 9.

[71]Although not noted by the Court in *Driver*, there is a division of medical opinion on the question of whether alcohol is addicting. The defense physician conceded this in the case at bar. A. 13-14. For an opinion that it is, see, e.g., Jellinek, *The Disease Concept of Alcoholism* (1960) 39-40. For an opinion to the contrary, see, e.g., Diethelm, *Etiology of Chronic Alcoholism* (1955) 5. The problem appears to be complicated by other problems often associated with excessive drinking, such as nutritional deficiency and bodily fluid-chemical imbalance. *Id.* We do not feel that the question is critical to the *legal* issues involved in this case.

[72]356 F.2d at 764 (emphasis supplied).

[73]See *supra*, p. 8.

straint." But, as we have stated, a similar argument could be made with respect to all violators of criminal restrictions, given similar assumptions, and ought not to nullify the criminal law.

The third reason given by the Court in *Driver* was:

> "Although his [Driver's] misdoing objectively comprises the physical elements of a crime, nevertheless no crime has been perpetrated because the conduct was neither actuated by an evil intent nor accompanied with a consciousness of wrongdoing, indispensable elements of a crime. *Morissette v. United States,* 342 U.S. 246, 250-252, 72 S.Ct. 240, 96. L.Ed. 288 (1952)."[11]

The Court did not support its assertion that Driver lacked consciousness of wrongdoing. Furthermore, the decision in *Morissette* was completely misunderstood. That case involved the question of whether the statute penalizing theft of government property, 18 U.S.C. 641, applied to one who thought the materials taken had been abandoned by the United States. The question was one of statutory construction, not of legislative power. Indeed, *Morissette* recognized that mens rea was not an element of many crimes."[12]

The final argument of the Court in *Driver* was:

> "Nor can his misbehavior be penalized as a transgression of a police regulation—malum prohibitum—necessitating no intent to do what punishes. The alcoholic's presence in public is not his act, for he did not will it. It may be likened to the movements of any imbecile or a person in a delirium of a fever. None of them by attendance in the forbidden place [illegible]y the forbiddance."[13]

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[11] See *supra,* p. 15.
[12] 356 F.2d at 764.
[13] 342 U.S. at 250-260.
[14] 356 F.2d at 764

The natural question to the assertion that Driver's presence in public was "not his act" is to ask, whose act was it?

The analogies to delirium and imbecility presumably raise a question of automatism (lack of any conscious mental state). The argument rests on a technical examination of time sequence and focuses on the moment of arrest. It urges that volitional, conscious conduct earlier in a spree of drinking is irrelevant to later unconsciousness at the time of appearance in public and arrest. If automatism due to gross intoxication were proven and declared a defense not only the habitual drinker would go free. *All* persons so intoxicated would also go free.[7] The New York Court of Appeals faced a similar question in the case of a defendant who was charged with recklessly killing four children by driving a motor vehicle, knowing he was subject to epileptic seizures at any time.[8] In rejecting a defense of lack of consciousness at the time of the killings, the Court stated:

> "To hold otherwise would be to say that a man may freely indulge himself in liquor in the same hope that it will not affect his driving, and if it later develops that ensuing intoxication causes dangerous and reckless driving resulting in death, his unconsciousness or involuntariness at that time would relieve him from prosecution under the statute. His awareness of a condition which he knows may produce such consequences as here, and his disregard of the consequences, renders him liable

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[7]The brief of Amicus National Counsel on Alcoholism urging invalidating public intoxication statutes as applied to all persons has the merit of candour, but its suggested nullification of statutes reaching the "status of human inadequacy" would seem to void all crime.

[8]*People v. Decina*, 2 N.Y.2d 133, 138 N.E.2d 799 (1956).

for culpable negligence, as the courts below have properly held. [citations omitted] To have a sudden sleeping spell, an unexpected heart or other disabling attack, without any prior knowledge or warning thereof, is an altogether different situation . . .'"[10]

The Court of Appeals in *Driver* seems to have adopted an opposing view, without analysis of the problem, and furthermore to have written its new defense into the Constitution.

In *Easter v. District of Columbia*, 361 F.2d 50 (C.A.D.C. 1966), eight judges sitting en banc held as a matter of statutory construction, that the District of Columbia prohibition against public intoxication had been modified by Congress in 1947[11] to exclude from penal liability a person who "habitually uses alcoholic beverages to the extent that he has lost the power of self-control." The Court did not state whether this last phrase refers to lack of power to abstain, lack of power to drink moderately, or both. As a question of statutory construction, the Texas Court's decision in the case at bar is to the contrary, of course, and is binding on this Court as a construction of state law."[12] However, four of the eight judges in *Easter* went further and by dictum stated that their decision would be the same under the Eighth Amendment. They quoted the language of *Driver*, supra, verbatim and did not seek to further the analysis of the problem.

A number of states have considered the question of whether addiction to narcotics is a defense under *Robinson* to crimes proscribing conduct related to the ad-

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[10] *Id.* at 804.
[11] 61 Stat. 744 C.472, now D.C. Code Sections 24-50 1 et seq.
[12] *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

diction. This contention has been rejected by the United States Court of Appeals for the District of Columbia,[45] and by the highest courts of the states of California,[46] Illinois,[47] Louisiana,[48] New Jersey,[49] and Wisconsin.[50] *A fortiori,* these decisions ought to be applicable to the case at bar.

6. *The alternatives to penal treatment of alcoholics are involuntary civil commitment or allowing them, if they choose, to remain on the streets. The former raises substantial libertarian dangers. The latter creates added risks to the health and lives of alcoholics and furthers the sense of frustration in those observing this untouchable class.*

Following the decision in *Robinson v. California*[51] the states of New York and California enacted statutes for civil commitment of narcotic addicts for treatment. These acts permit indefinite incarceration if successful treatment is not achieved.[52] Stimulus to similar

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[45] *Lloyd v. United States,* 343 F.2d 243 (1964) (possession of narcotics by addict in violation of Harrison Act. *Robinson* held inapplicable.)

[46] *In re Carlson,* 48 Cal.Rptr. 875, 410 P.2d 379 (1966) (penal prohibition against use of narcotics by addict unaffected by *Robinson*); *People v. O'Neil,* 44 Cal.Rptr. 320, 401 P.2d 928 (1965) (driving a motor vehicle while addicted to narcotics, *Robinson* held inapplicable.)

[47] *People v. Nettles,* 34 Ill.2d 52, 213 N.E.2d 536 (1966) (possession of narcotics by addict, *Robinson* held inapplicable.)

[48] *Blouin v. Walker,* 244 La. 699, 154 So.2d 368 (1963) (use of narcotics by addicts; *Robinson* held inapplicable.)

[49] *State v. Margo,* 40 N.J. 188, 191 A.2d 43 (1963) (being under the influence of narcotics, *Robinson* held inapplicable).

[50] *Browne v. State,* 24 Wis.2d 491, 129 N.W.2d 175 (1964) (use of narcotics by addict, *Robinson* held inapplicable.)

[51] 370 U.S. 660 (1962).

[52] See Note, *Civil Commitment of Narcotics Addicts,* 76 Yale L.J. 1160 (1967).

activity might be involved in a reversal of the case at bar. Loss of liberty would then take the form of preventive detention for the compulsory "treatment" of alcoholics for their own benefit, as paternalistically conceived, and to keep them from the public view. Theoretically such treatment might continue until—and unless—the patient was pronounced recovered. From a treatment standpoint, delinquent public behavior would be irrelevant, as would be the amount of social harm which a patient had caused.

The most likely subjects for civil commitment would presumably be the skid row alcoholics who constitute so substantial a portion of those presently arrested.[11] There is reason to believe that these persons present the poorest prognosis. A recent report states that on the basis of limited information available, it is likely that less than 10 or 12 percent of this group "can obtain *aid* from ordinary therapy."[12] There is a wide range of therapies in use: emetic drugs given along with alcohol to produce nausea and vomiting and hence hopefully to condition aversion, tranquilizing drugs, disulfiram ("Antabuse") to produce flushing, extreme unease, nausea, and vomiting in the event of ingestion of alcohol, and psychotherapy are among those utilized.[13] Institutional facilities and trained staffs to accommodate the huge numbers of alcoholics who would be subject to being rounded up for treatment are

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[11] See *Report of the President's Commission on Law Enforcement and Administration of Justice* (1967) 233-235.

[12] U.S. Department of H.E.W., Public Health Service, *Alcohol and Alcoholism* (1967) 37, (emphasis supplied).

[13] See Id. at 33; treatments less commonly used today include electric shock, spinal drainage to reduce intracranial pressure, insulin coma. Chafetz and Demone, *Alcoholism and Society* (1962) 213.

largely nonexistent." And should facilities be constructed, the level of staffing and care in public mental hospitals in the United States does not provide much encouragement that institutions for care of alcoholics would be effective ones.

A recent report states:

> "Although treatment for problem drinkers is essential, it is not in itself prevention; treatment efforts probably cannot even cope with new cases as they arise: problem drinkers are so numerous that treatment for all would require the efforts of most of the professionally trained physicians, psychiatrists, social workers, nurses, and psychologists in the country. And there is little likelihood that the number of workers in these fields could be sufficiently increased to treat even a large minority of problem drinkers. In California, for instance, according to the best estimate available, providing all problem drinkers with weekly contact with a psychiatrist and once-a-month contact with a social worker would require the full time work of *every* psychiatrist and *every* trained social worker in the United States.'"[11]

In view of libertarian values involved and the poor prognosis for successful treatment, doubts have been expressed with respect to the desirability and even the constitutionality of civil commitment.[12] Mr. Peter Barton Hutt, counsel in the present case for Amici A.C.L.U. et al., has been quoted as stating to the

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[10] See *Report by the President's Commission on Law Enforcement and Administration of Justice* (1967) 235.

[11] Cooperative Commission on Study of Alcoholism, *Alcohol Problems* (1967) 120 (emphasis original).

[12] See *Report of the President's Commission on Crime in the District of Columbia* (1966) 499.

1966 annual meeting of the National Council on Alcoholism:

> "I have grave doubts . . . . about the constitutionality of wholesale civil commitment of chronic alcoholics. We have not fought for two years to extract DeWitt Easter, Joe Driver, and their colleagues from jail, only to have them involuntarily committed for an even longer period of time, with no assurance of appropriate rehabilitative help and treatment. The euphemistic name 'civil commitment' can easily hide nothing more than permanent incarceration [. . . I would caution those who might rush headlong to adopt civil commitment procedures and remind them that just as difficult legal problems exist there as with the ordinary jail sentence.'"[7]

The New York Civil Liberties Union has filed an action to invalidate the New York statutes for civil treatment of narcotics addicts urging similar grounds.[8] If civil treatment is lacking in facilities or in means to compel cooperation of the alcoholic, the "revolving door" may turn even more rapidly. The experience of Washington, D. C., after the *Easter* decision may be expected to be repeated across the land, if *Robinson* is extended to public drunkenness:

> "A deadly drama is played daily in front of the District's Alcoholic Rehabilitation Clinic.
>
> "Its dazed, glassy-eyed participants lurch off Health Department busses and stumble toward the clinic. Most never get there.
>
> "Some, their shoulders hunched deep into tattered jackets, walk past the old red-brick building

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[7] Quoted in Robitscher, *Psychiatry and Changing Concept of Criminal Responsibility*, 31 Federal Probation 49 (1967).
[8] See New York Times, Nov. 14, 1967, p. 39, col. 2.

at 14th and Q streets, N.W. Others stagger up the two flights of stairs to the clinic, peer into the gloomy waiting room, and then shuffle back down the stairs.

"In one day last week, 200 of these court-adjudged chronic alcoholics were transported to the clinic. Only 28 registered for treatment.

"Confronted with inadequate long-term treatment facilities, many will never awaken from their blurred nightmare world. They will freeze to death on the District's streets this winter or be killed in desperate struggles with other drunks for food, liquor and clothing.

"This bleak picture was painted by Dr. Sanford L. Billet, chief of the Clinic. . . .

* * *

"Moreover, Billet said, the clinic's handling of derelict alcoholics is 'set up to fail.' He explained.

" 'It is difficult to enter into a meaningful relationship with a skid-row alcoholic. The patient must have some purpose consonant with the doctor's purpose. There must be some agreement on goals, a common meeting ground.

"Billet said that 'therapeutic contact' had been established with less than 10 per cent of the skid row alcoholics who have trudged into the center since the federal court ruling. Of these, he said, only a tiny percentage has been helped.'"[1]

Appellant does not view criminal proscription of public intoxication by chronic inebriates with satisfaction. It earnestly hopes that experimentation with different programs by legislators, administrators,

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[1] The Washington D.C. Evening Star, October 26, 1966, p. 1, col. 1.

courts, and private agencies develop satisfying alternatives. But it urges that the response of our society to the enormously complex problems associated with this case not be controlled by constitutional adjudication.

## CONCLUSION

For the reasons stated, appellant urges that the judgment of the court below be affirmed.

Respectfully submitted,


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## CERTIFICATE OF SERVICE

I hereby certify that copies of the Brief for Appellee were served on the attorney for the Appellant by depositing same in the United States Mail, postage prepaid, certified mail, on this the ____ day of January, 1968, addressed as follows: Mr. Don L. Davis, Byrd, Davis, Eisenberg & Clark, Attorneys at Law, 214 Austin National Bank Building, Austin, Texas 78701.

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